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In The

Supreme Court of the United States

October Term, 1979

No. 79-1741

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, Harold Jackson, Darrell L., Harold, Harold M. and Luea Sorenson,

Petitioners,

No. 79-1744

R. G. P. Incorporated, Otis Peterson, and Travelers Insurance Company,

Petitioners,

No. 79-1779

State of Iowa and State Conservation Commission of the State of Iowa,

Petitioners,

vs.

Omaha Indian Tribe and United States of America,

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF GORDON DAHL AND 81 OTHER FARM OWNERS IN MONONA COUNTY AS AMICI CURIAE

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BRIEF OF GORDON DAHL AND 81 OTHER FARM OWNERS IN MONONA COUNTY AS AMICI CURIAE

The 82 individual farm owners whose names are listed inside of the cover respectfully submit this brief as *amici curiae.* It is submitted in support of the petitions for writ of certiorari filed in this case on behalf of the above named petitioners to review the judgment and opinion of the U. S. Court of Appeals for the 8th Circuit entered on

January 15, 1980. All parties have signed a written consent to the filing of this brief pursuant to Rule 42.2.

STATEMENT

These amici adopt the sections of the Petitions of Petitioners Wilson, Lakin, Jackson, Sorenson, R. G. P., Incorporated, Otis Peterson, Travelers Insurance Co., State of Iowa and the State Conservation Commission of the State of Iowa entitled:

Opinions Below and of this Court
Jurisdiction
Questions Presented for Review
Constitutional and Statutory Provisions Involved, and
Statement of the Case.

In addition these amici supplement said Petitions with the following statement of their interests in this case and of their reasons this Court should grant the Petitions and review the decision of the Court of Appeals.

STATEMENT OF INTERESTS OF AMICI CURIAE

The interests of these amici were set out fully in the Brief of Gordon Dahl and 81 Other Farm Owners in Monona County (pp. 2-5) filed in support of the previous petitions for certiorari filed by Wilson, et al., R. G. P., Incorporated, et al., and the State of Iowa, et al. (Nos. 78-160, 161, and 162 reported at 442 U. S. 653, 99 S. Ct.

2529, 61 L. Ed. 2d 153 (1979)). Reference is made to the Statement of Interests in that brief which will not be repeated here. Briefly these amici are individual owners of family sized farms located in Iowa outside the original reservation as shown by the Barrett Survey. Many of these farms have been in amicis' families for generations with title in some instances originating in patents direct from the U. S. government. Their ancestors cleared, settled and developed these farms, which at the time of acquisition were in a wild and undeveloped state.

In its original action filed in 1975 (No. 75-4067), the Omaha Tribe named these amici as defendants along with present petitioners demanding that some 6,500 acres be taken from amici and given to the Tribe. The trial court severed that portion of No. 75-4067 involving amicis' land for subsequent trial, and it was not included in the trial nor before this Court in the cases designated Nos. 78-160, 161, and 162 on which writs of certiorari were previously granted. Thus amici have not yet had an opportunity to defend their property against the Tribe's claims, which still remain to be tried at a later date. They have watched the unsevered litigation which has gone forward against petitioners with great concern, as their own rights may be affected decisively by the manner in which the claims against petitioners are finally adjudicated. This is true even though the location of amicis' land, unlike that of petitioners in the present application, lies outside the Barrett Survey.

The amici are vitally interested in the granting of the present petitions for writ of certiorari for the following reasons:

1. There is a substantial danger that the decision of the Court of Appeals, if not reviewed by this Court, will prejudge, prejudice and destroy amicis' rights and in effect deprive them of their property without due process. This will have occurred while amici have been denied their right to trial of the claims against them by virtue of the trial court's having severed such claims and ordered that they will not be tried until final adjudication of the claims against petitioners.

2. The Court of Appeals' decision for which review is sought substantially ignores and evades long established state laws of accretion and avulsion upon which these amici and their families have relied for generations. Those rights were preserved by this Court in its decision in Nos. 78-160, 161 and 162 when it found the Court of Appeals should have incorporated Nebraska law in determining whether there had been accretion or avulsion and on remand ordered the Court of Appeals to consider whether the District Court had correctly interpreted Nebraska law and properly applied it to the facts. *Wilson v. Omaha Indian Tribe, et al.*, 442 U. S. 653, 99 S. Ct. 2529, 61 L. Ed. 2d 153 (1979).

3. The Court of Appeals has failed to comply with the mandate of this Court upon remand in that it has not incorporated the standards of accretion and avulsion as decided by the Nebraska Supreme Court into its latest decision. Chief of these standards is the indispensable and long established requirement of avulsion that identifiable land must remain in place after an avulsion.

4. The constitutionality of 25 USC Sec. 194 is a question of significant national importance which merits consideration by this Court.

These amici are for the most part individual family farmers owning tracts whose average size is about 186 acres. Many are descendants of the first pioneers who settled western Iowa. When their ancestors purchased these lands in the late 19th and early 20th centuries they were on the Iowa side of the Missouri in a wild and undeveloped state. They cut timber, cleared the land and put it under cultivation for the first time. Through succeeding years their descendants have continued to develop and improve the land and increase its value. During this entire period in which the Iowa side of the river has been transformed from wilderness into some of the most valuable farm land in the U. S., the Omaha Indian Tribe has remained on the Nebraska side apparently uninterested in and certainly making absolutely no contribution to this remarkable improvement. The Tribe gave these amicis and their predecessors no indication of any claim to amicis' land until about the time this suit was filed in 1975. The filing of such suit has imposed heavy burdens on these amici ever since, casting a serious cloud on amicis' title, and making it difficult to sell land which has been readily salable for a hundred years. For the first time lending institutions have become reluctant to make loans on amicis' land, prospective buyers are looking elsewhere and land values are declining. These amici have had to bear the considerable cost of their defense unassisted, including attorney, engineers and surveyor fees. In contrast the Omaha Indian Tribe is enjoying a free ride in this litigation, with expenditures conservatively estimated at a half million dollars already made by the Department of Justice and Bureau of Indian Affairs, to be borne by the taxpayer. Amici are therefore vitally in-

terested in the granting of certiorari to enable this Court to subject Sec. 194 to constitutional scrutiny and review whether its mandate has been followed. This should be done *now* before further damage is done to amici and before they are forced to incur additional costs of defense which may in turn have to be duplicated if review by this Court is postponed until a later date.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' interpretation and application of 25 U. S. C. Sec. 194 if permitted to stand will affect the rights of all citizens who assert or resist Indian claims to property, real or personal, throughout the United States. The statute requires strict scrutiny as to its constitutionality because it is racially discriminatory on its face restricting fundamental rights of white persons. Whether it violates constitutional standards is an issue of major national significance which merits determination by this Court.

In their brief submitted in support of earlier petitions for writ of certiorari, these amici urged that 25 U. S. C. Sec. 194, whose constitutionality had not been passed upon in 144 years, should now be reviewed by this Court for that purpose. The brief pointed out that the original decision of the Court of Appeals Appendix A. 20, 575 Fed. 2d 620, at p. 631, gave no serious consideration to the constitutional question, disposing of it in a single footnote citing only one case which amici contended was not in point.

Morton v. Mancari, 417 U. S. 535, 554-555 (1974). However, this Court limited its grant of certiorari to other questions and has not yet considered or ruled upon the constitutionality of Sec. 194. This should now be done.

These amici respectfully reiterate the argument stated on the issue of constitutionality at pp. 6 through 10 of their earlier brief. They urge that Sec. 194 constitutes invidious racial discrimination upon its face because it shifts the burden of proof from plaintiffs (where it has always rested) to white persons solely on the basis of their race and color. The statutory preference for Indians falls squarely within the definition of discrimination for its own sake which this Court has held the Constitution forbids.

> "Preferring members of any one group for no reason other than race or ethnic origins is discrimination for its own sake. This the Constitution forbids." *Regents of California v. Bakke,* 438 U. S. 265, 98 S. Ct. 2733, at p. 2757, 57 L. Ed. 2d 750 (1978).

Sec. 194 also falls within the definition in *Bakke* p. 2782 of a "statute which restricts 'fundamental rights' and therefore is to be subjected to 'strict scrutiny.'" Sec. 194 as now interpreted shifts the burden of proof to white persons in property disputes and thereby does indeed restrict their fundamental constitutional rights not to be deprived of property without due process (Fifth Amendment) and to equal protection of the laws (Fourteenth Amendment). It is difficult to imagine how any statute could be a more eligible candidate for the "strict scrutiny" promised in *Bakke* than is Sec. 194. The granting of a writ of certiorari is an appropriate vehicle for the kind of searching constitutional examination which *Bakke* requires. This will also afford ample opportunity to consider whether the

statute "furthers a compelling governmental purpose" sufficient to justify its being upheld on that ground (*Bakke* p. 2782).

As contended in amicis' earlier brief, the interpretation of Sec. 194 which arises from the present posture of this case would place great burdens on them in the defense of their own family farms. Notwithstanding the fact that their land lies outside the Barrett Survey and the Court of Appeals stated its application of Sec. 194 is not controlling as it affects their land, that Court also held open the danger that the section might be "applicable under different proof". See, *Omaha Indian Tribe v. Wilson, et al.*, 575 F. 2d 620, footnote 69 at p. 651, Appendix A65, 66.

Amici therefore face the possibility that if the constitutionality of Sec. 194 is not now reviewed, it may be used against them later depriving them of their property without due process. Such racial discrimination is proscribed by the following decisions of this Court:

> *Bolling v. Sharp*, 347 U. S. 497, 98 L. Ed. 884, 74 S. Ct. 693 (1954).
>
> *Weinberger v. Weisenfeld*, 42 U. S. 636, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975).
>
> *Washington v. Davis*, 426 U. S. 229, 240, 48 L. Ed. 2d 597, 607, 96 S. Ct. 2040 (1976).

The issue of constitutionality should be determined now rather than left to hover uncertainly over the as yet untried portion of No. 75-4065 involving 8,000 additional acres (6,500 of which are owned by these amici).

These amicis' need for constitutional review is urgent, substantial and direct. But it is dwarfed in comparison

with the greater national interest which will be served by the granting of a writ. Why is there a compelling national need for this Court to review the constitutionality of 25 U. S. C. Sec. 194 at this time? Because the section is so broad as to encompass all property disputes in which individual Indians or Indian tribes are involved everywhere in the United States. Not just land claims, but *property* of any description. In the eyes of lawyers representing Indians, this could range from a repossessed television set to entire states. All the Indian or tribe has to do to gain the preference and title presumption of the statute is to make a showing "of previous possession or ownership". In today's activist climate, lawyers are already claiming that Indians own the entire North American continent because parts of it were roamed ergo "possessed" by various aboriginal tribes. Whether this is right or wrong, it does point up the potential far-reaching impact of a statute which lay dormant from its enactment in 1834 until invoked by the Court of Appeals in this case. If that Court's interpretation and application of the statute is permitted to stand, it will affect the rights of all citizens who assert or resist Indian claims to property, real or personal, throughout the U. S. This makes it imperative that the petitions for writ of certiorari be granted to afford the necessary review of constitutionality at the highest judicial level.

2. The Court of Appeals has not complied with the mandate of this Court that it should incorporate the law of Nebraska in determining whether there had been an avulsion or accretion. The Court of Appeals has instead in its decision persisted in attempting to justify and vindicate its earlier choice of federal common law independent of

state law. A writ should be granted to determine whether the mandate has been followed and if not to enable this Court to enforce its mandate.

In its remand order this Court unequivocally directed the Court of Appeals to incorporate Nebraska law (which it had not followed in arriving at a federal standard) to determine whether there had been an avulsion or an accretion. This Court emphasized "the importance of attending to state law." App. 24, 442 U. S. 653, 99 S. Ct. 2529 at p. 2542, 61 L. Ed. 2d 153 (1979).

This Court clearly expressed its intention that state law should be controlling in any future consideration of the case rather than the federal common law which had been followed independent of state law by the Court of Appeals. This Court stated "we discern no imperative need to develop a general body of federal dispute". App. 21, 442 U. S. 653, 99 S. Ct. 2529 at p. 2541, 61 L. Ed. 2d 153 (1979). Surely state law in this context means state law as determined by the Nebraska Supreme Court and the task of correctly interpreting state law assigned to the Court of Appeals would require it to undertake a thorough and open-minded analysis of decisions of the Nebraska Supreme Court.

No such analysis appears in the decision which this Court is now requested to review. The only review of Nebraska cases appearing therein is designed to renew the suggestion that the Nebraska court has never evolved or enforced standards of accretion or avulsion of its own but has at all times merely followed the lead of the federal courts embracing federal common law in this respect. Rather than comply with the mandate to apply Nebraska

law the Court of Appeals seeks to justify and re-establish its earlier choice of federal common law. If Nebraska case law had been given the measured consideration it deserves, the Court of Appeals would accept rather than belittle standards of accretion and avulsion which have been established and consistently followed by the Nebraska Supreme Court, including the indispensable requirement that identifiable land must remain in place after an avulsion.

Instead the opinion below brushes identifiable land in place aside as if it had not been repeatedly and uniformly required by the Nebraska Court.

The following excerpts illustrate the opinion's down grading of the Nebraska court's ability to formulate and enforce its own standards while exalting a federal common law which purportedly dispenses with the requirement of identifiable land in place:

"Upon examination of Nebraska case law, we conclude Nebraska adheres to the *common law principles governing avulsion set forth in our earlier opinion.* (emphasis supplied) * * * Our prior analysis * * * finds full accord in Nebraska case law. Nearly all the earlier Nebraska cases we have examined rely upon these and other early federal cases for definitions of accretion and avulsion." App. 36, 37, 614 F. 2d 1153, 1156.

"The Nebraska Supreme Court's definition of avulsion is similar to *that set forth in our prior opinion as the federal standard* (emphasis supplied) in that it is not as narrow as the district court's reasoning would indicate." App. 40, 614 F. 2d at p. 1158. (The footnote cited in support of this statement contains nothing to suggest the Ne-

braska Supreme Court has ever failed to enforce the requirement of identifiable land in place. In fact, this footnote gives no real support to any of the statement for which it is cited.)

"The Nebraska cases indicate *Nebraska follows the basic common law principle:* avulsion occurs when there is a sudden and rapid change of the channel, within or without the bed of the stream, etc." (Emphasis supplied.) (App. 41, 614 F. 2d at p. 1158. (None of the Nebraska cases cited thereafter abandons identifiable land in place or states that an avulsion can occur *within* the riverbed.)

"We adhere therefore to our earlier holding that the district court erred in including within the definition of accretive change a sudden movement without evidence of identifiable land in place." 8 App. 42, 614 F. 2d at p. 1159. The footnote cites *Conkey v. Knudsen,* 143 Neb. 5, 8 N. W. 2d 538 (1943) (vacating 141 Neb. 517, 4 N. W. 2d 290 (1942)) which the Court of Appeals states:

> "does not, we feel, represent a departure from the basic common law definitions. * * * Conkey II does mention absence of identifiable land, but nevertheless gives the basic common law definition of avulsion: 'Avulsion is the sudden and rapid change in the course and channel of a river.' " *Id.* at 10, 8 N. W. 2d at 541.

Conkey II did more than merely *mention* absence of identifiable land, it held expressly there can be no avulsion without identifiable land remaining in place.

"We conclude both Nebraska and federal common law apply the same basic definitions of avulsion and accretion to boundary disputes caused by a river channel change." App. 45, 614 F. 2d at p. 1160.

The above excerpts strongly indicate that the Court of Appeals was more interested in justifying and vindicating its earlier choice of federal common law than it was in "attending to state law" as mandated by this Court. Sufficient doubt exists as to whether the Court's mandate has been followed to justify issuance of a writ of certiorari.

> *Cascade Natural Gas Corporation v. El Paso Natural Gas Co.*, 386 U. S. 129 (1967).
>
> *Continental Insurance Co. v. U. S.*, 259 U. S. 156, 166 (1922).

A writ should be granted to enable this Court to determine whether its mandate has been followed and to take appropriate action to enforce said mandate if it has not.

3. The Court of Appeals' decision fails to recognize and apply standards of accretion and avulsion under Nebraska state law which have been developed and confirmed over a period of many years in numerous decisions of the Nebraska Supreme Court. The most important of these standards is the avulsion requirement of identifiable land remaining in place.

In its effort to justify its earlier choice of federal common law as the law of decision, the Court of Appeals has ignored and/or misinterpreted the following Nebraska cases (emphasis in all quotations is supplied):

> *Bouvier v. Stricklett*, 40 Neb. 792, 59 N. W. 550 at p. 553 (1894).

In defining avulsion, the court cited the following quotation from Vattel with approval:

> "in the very uncommon case called 'avulsion', when the violence of the stream separates a considerable

part from one piece of land, and joins it to another, but in such a manner *that it can still be identified,* the property of the soil so removed naturally continues vested in its former owner." At p. 553. Emmerick Vattel, The Law of Nations, Principles of Natural Law Applied to the Conduct of Nations & Sovereigns (publ. 1758) Book 1, Chap. 22, Sec. 268-70.

Independent Stock Farm v. Stevens, 128 Neb. 619, 259 N. W. 647, 648 (1935).

Defining avulsion thus:

"This means that suddenly, or by violent action of the elements, it leaves its old channel and creates a new one. In such cases the original thread of the stream continues to mark the limits of the two estates, and land which is so cut off can be followed *and identified,* and its title remains in the original owner." At p. 648.

Iowa Railroad Land Co. v. Coulthard, 96 Neb. 607, 610, 148 N. W. 328, 329 (1914) (requiring avulsed land must be detached from one bank and attached to the other "in such a way that it is *capable of identification".*)

Wiltse v. Bolton, et al., 132 Neb. 354, 272 N. W. 197 (1937).

Frank v. Smith, 138 Neb. 382, 293 N. W. 329, 33 (1940) (defining avulsion as "the sudden and rapid change of the channel of the stream which is the boundary, whereby it *abandons its old* and *seeks a new bed."* At p. 33. Such definition is incompatible with the Court of Appeals' theory that avulsion can occur within the bed of a stream.)

Conkey v. Knudsen, 143 Neb. 5, 8 N. W. 2d 538 (1943), vacating 141 Neb. 517, 4 N. W. 2d 290 (1920).

First National Bank v. McFerrin, 142 Neb. 627, 9 N. W. 2d 167, at p. 172 (1943) (repeatedly used

the words *identified, identifiable* and *identification* as necessary before finding an avulsion. Examples follow.)

"defendant adduced evidence that the lands in question cannot be *identified* as lands cut off from Nebraska by avulsion * * * the trial court erred in refusing to submit this controverted issue to the jury." At p. 172.

"the parties are in accord on the proposition that, if this is *identifiable* land cut off by avulsion, it never was * * * a part of the domain of the State of Iowa." At p. 169.

"The parties here do not question that at that time the land in issue here, if it was then subject to *identification,* was not within the Iowa boundaries." At p. 169.

All of the above Nebraska cases either (1) insist on identifiable land remaining in place as a prerequisite of avulsion or (2) state that avulsion occurs not within the bed of a stream but rather when the river changes to a new bed altogether. The decision of the Court of Appeals fails to cite any Nebraska case in point which reverses either of the above 2 fundamental propositions of Nebraska law. The closest the decision comes is to cite an island case, *State v. Ecklund,* 147 Neb. 508, 23 N. W. 2d 782 (1946), App. 39, 43, 614 F. 2d 1157, 1159, which falls within the well known island exception to the law of accretion. *Commissioner v. U. S.,* 270 F. 110, 113 (CA 8, 1920). This case on which certiorari is now sought is not an island case and the Court of Appeals has cited no authority to justify its novel theory that there may be an avulsion *within* the bed of the river by extending the island rule to a non-island situation. Neither this theory nor the decision's abandonment of identifiable land in place finds any support in the Nebraska cases.

A writ of certiorari should be granted to enable this Court to determine whether the decision below does indeed fail to incorporate Nebraska law as set forth in the above decisions.

CONCLUSION

For all the above reasons, these amici respectfully urge that the petitions in this case should be granted.

Respectfully submitted,

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